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# Contextualization Shadow Conversations

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## ESSAY

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### CONTEXTUALIZING SHADOW CONVERSATIONS

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JAMES J. BRUDNEY†

#### INTRODUCTION

In *Legislating in the Shadows*,<sup>1</sup> Professor Walker has deftly presented one side of the drafting conversation that occurs between agency officials and congressional staff. Looking through the window of *technical drafting assistance*—assistance typically provided through conversations responding to congressional staff requests without Office of Management and Budget (OMB) review or approval—Professor Walker sets forth and develops wide-ranging and nuanced findings from agency participants in these conversations. His findings describe how agency officials understand their active and nonpublic role in the formulation of statutory text from its early stages. He then cogently analyzes certain implications from the standpoint of how agencies apply their interpretive authority and power.

There is much to admire in Professor Walker’s approach. Empirically, he identifies and unpacks an underappreciated aspect of contemporary federal lawmaking. Analytically, Walker offers a rigorous assessment of doctrinal implications from a statutory interpretation standpoint. He situates both the

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<sup>1</sup> Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377 (2017).

purposivist<sup>2</sup> possibilities and the deference-related risks in the context of other scholarly efforts, including several quite recent contributions.<sup>3</sup>

I approach the drafting conversation described by Professor Walker from the opposite side—that of congressional staff. In doing so, I suggest that this conversation is complex and variable in ways that go beyond what might typically be understood by agency officials. Building off of this complexity, I explore certain implications of Professor Walker’s analysis, by examining the four principal reasons that agency officials offered for responding to every congressional request for technical assistance.<sup>4</sup> While I share Professor Walker’s view that agencies gain special purposivist insights from their privileged participatory position in the drafting process, I am not convinced that this privileged position is due in any meaningful way to agencies’ role as shadow legislative drafters.<sup>5</sup> Consequently, I remain skeptical that the shadow drafting role creates special risks of self-aggrandizing interpretive powers, or that it materially contributes to existing concerns regarding the amount of deference agency interpretations should receive.

### I. THE VARIABILITY OF CONGRESSIONAL DRAFTING CONVERSATIONS

Professor Walker recognizes that the technical-drafting-assistance veil he has pierced by interviewing agency officials remains partially obscured—and in particular, that congressional staff may disagree about the rate at which they request or accept technical drafting assistance, as well as the factors that affect whether they

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<sup>2</sup> Purposivism refers to the recognition that statutes are more than disembodied textual products—they are a form of communication reflecting a purposive group effort. As succinctly expressed by Hart and Sachs, “Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living . . . [thus] every statute . . . has some kind of purpose or objective, however difficult it may be on occasion to ascertain it or to agree exactly how it should be phrased.” HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 148 (William N. Eskridge, Jr. & Philip P. Frickey eds., 2006).

<sup>3</sup> See Walker, *supra* note 1, at 1382 n.13 (discussing recent empirical work by Jarrod Shobe and by Ganesh Sitaraman, which began to explore agency provision of technical drafting assistance); *id.* at 1399 (discussing a recent article by Cass Sunstein arguing that because of their institutional expertise, agencies may be justified in construing statutes in light of their purposes, not just their text); *id.* at 1408 (discussing a 2015 concurring opinion by Justice Thomas urging abolition of *Auer* deference to agency interpretations of their own regulations); *id.* at 1415 (discussing a recent article by Neomi Rao identifying the possibility of “administrative collusion,” where members of Congress have a unique relationship with agency heads and undue law interpretation powers).

<sup>4</sup> These four reasons are: fostering a productive working relationship with Congress; educating congressional staff; avoiding unnecessary disruption of an existing statutory scheme; and generating “intelligence” to anticipate and respond to new legislative proposals. See *id.* at 1390–91.

<sup>5</sup> Professor Walker distinguishes agencies’ more visible foreground role in helping to draft substantive legislation from their background or shadow role providing confidential technical drafting assistance. See *id.* at 1378–79.

seek such assistance.<sup>6</sup> In this Part, I attempt to provide a more complete picture of the legislative drafting enterprise, based on my first-hand congressional experience as well as analyses of the legislative process by other scholars.

From 1985 to 1992, I served as minority counsel (1985–1986) and chief counsel and staff director (1987–1992) for the Senate Subcommittee on Labor.<sup>7</sup> This was a period of heavy legislative activity aimed at providing workplace-related protections in the subject areas of labor and civil rights. Factors contributing to the high level of activity include an aging workforce that focused attention on the opportunities and obstacles faced by older workers;<sup>8</sup> the strength of interest group coalitions involving organized labor, local governments, and civil rights groups;<sup>9</sup> Congress's felt need to respond to a number of Supreme Court decisions;<sup>10</sup> and an active response to the bottled-up demand for social change after five years of the Reagan Administration.

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<sup>6</sup> See *id.* at 1395 (noting that “the study did not endeavor to interview or survey congressional staffers” and that the staffers “may well disagree” with the conclusions of agency officials regarding technical drafting assistance).

<sup>7</sup> In 1985–1986, the subcommittee was chaired by Senator Nickles (R–Okla.); the ranking minority member was Senator Metzenbaum (D–Ohio). From 1987–1992, Senator Metzenbaum chaired the subcommittee and first Senator Quayle (R–Ind.), then Senator Jeffords (R–Vt.), served as ranking minority member. The Senate Labor and Human Resources Committee was chaired by Senator Hatch (R–Utah) in 1985–1986 and Senator Kennedy (D–Mass.) from 1987–1992. My primary principal during these seven years was Senator Metzenbaum; I also engaged regularly as an agent for the leadership and decisional directions set by Senator Kennedy and his staff. In addition, as is typical on the Hill, I worked closely with staff members serving the other chairpersons and ranking minority members as well as staff for other Democratic members of the subcommittee and the full committee.

<sup>8</sup> See Clyde H. Farnsworth, *The Discovery of Political Muscle*, N.Y. TIMES, Sept. 11, 1987, at A20 (reporting on the American Association of Retired Persons (AARP) as a major political player on Capitol Hill, with one of its key issues being the right of older people to work); Penny Singer, *Enticing and Keeping the Older Worker*, N.Y. TIMES, May 28, 1989, at WC12 (reporting that workers aged 55–65 outnumbered teenage workers in the U.S., but younger managers were reluctant to hire older workers); Leonard Sloane, *New Laws Allow More To Work After Age 70*, N.Y. TIMES, Feb. 16, 1987, at 43 (reporting on the new federal law abolishing mandatory retirement as likely to spur more senior citizens to remain in workforce).

<sup>9</sup> See, e.g. 131 Cong. Rec. 28,983–84 (Oct. 24, 1985) (including statements of Senator Nickles and Senator Metzenbaum, citing support for the 1985 FLSA compensation time/overtime law from AFL-CIO, US Conference of Mayors, National League of Cities, and other public employer groups); Edward J. Cleary, Letter to the Editor, *Modest and Crucial*, N.Y. TIMES, May 24, 1988, at A26 (describing that the National Association of Counties, National League of Cities, and AFL-CIO all supported enactment of a law requiring employers to give sixty days notice prior to plant closings or mass layoffs);

<sup>10</sup> See Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991) (codified at various sections of 42 U.S.C.) (overriding *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and numerous other Supreme Court decisions construing Title VII); Older Workers Benefit Protection Act, Pub. L. No. 101–433, §101, 104 Stat. 978 (1990) (codified at various sections of 29 U.S.C.) (responding to *Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989)); Fair Labor Standards Amendments of 1985, Pub. L. No. 99–150, 99 Stat. 787 (codified principally at 29 U.S.C. § 207(o)) (responding to *Garcia v. San Antonio Transit Auth.*, 469 U.S. 528 (1985)).

Given these and perhaps other causal factors, Congress enacted an unusually large number of important workplace protection statutes between the fall of 1985 and the fall of 1991. I was involved as a leading Senate committee staffer in the drafting and negotiation for many of these laws: amending the Fair Labor Standards Act provisions on overtime protections for public employees;<sup>11</sup> abolishing mandatory retirement;<sup>12</sup> providing advance notice to workers terminated due to plant closings or mass layoffs;<sup>13</sup> increasing protections for older workers in the area of employee benefits;<sup>14</sup> and extending or restoring rights against race and sex discrimination in response to numerous restrictive Supreme Court decisions.<sup>15</sup>

During the drafting, negotiation, and enactment of these five major laws, I had very little contact with Department of Labor or Equal Employment Opportunity Commission (EEOC) officials in the Reagan and George H.W. Bush administrations.<sup>16</sup> The virtual absence of contact during the drafting

11 Fair Labor Standards Amendments of 1985, *supra* note 10.

12 Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (codified principally at 29 U.S.C. § 631(a)).

13 Worker Adjustment and Retraining Notification Act of 1988, Pub. L. No. 100-379, 102 Stat. 890 (1988), (codified at 29 U.S.C. §§ 2101-2109).

14 Older Workers Benefit Protection Act of 1990, *supra* note 10.

15 Civil Rights Act of 1991, *supra* note 10. In addition to the five major laws in which I was heavily involved as a Senate subcommittee chief counsel, there were numerous other workplace-related statutes enacted in which I played a more limited staffing role. *E.g.*, Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327; OSHA Criminal Penalty Reform Act, Pub. L. No. 101-508, §3101, 104 Stat. 1388, 1388-29 (1990); Employee Pension Protection Act, Pub. L. No. 101-239, §7881, 103 Stat. 2106, 2435-44 (1989); Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157, 103 Stat. 938 (1989); Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988); Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347, 102 Stat. 646. Finally, there were major proposed laws that passed the House but were filibustered in the Senate in which I participated as the key Senate committee staffer. *E.g.*, Workplace Fairness Act of 1992, S.55, 103d Cong. (1992); High Risk Occupational Disease Notification and Prevention Act of 1987, S.79, 100th Cong. (1987).

16 For the Civil Rights Act of 1991, several staff from the Senate Judiciary Committee played a more central role than I did in the drafting and negotiations—they may have had agency interactions of which I was unaware. The other four laws referenced in text were drafted and/or steered through the Senate Labor Subcommittee, and I was either a, or the, principal Senate committee staffer involved. For the Worker Adjustment and Retraining Notification (WARN) Act, the Republican Labor Department had extensive discussions with committee staff from both parties and chambers of Congress following enactment, when considering how to approach the drafting and implementing of regulations. Somewhat ironically, these quite constructive and fruitful discussions reflected the Department's relative insulation from the drafting and negotiation processes that occurred in Congress in 1987 and 1988. This was a period during which President Reagan expressed his strong opposition to the proposed law, vetoing legislation that contained the advance notice provisions and then allowing the WARN Act to become law without his signature when it passed both houses a second time by veto-proof majorities. *See* Worker Adjustment and Retraining Notification Act of 1988, *supra* note 13 (note from Federal Register reporting that the Act became law without the signature of the President); *see also* Editorial, *A Fair and Practical Plant-Closings Bill*,

process also was true for the two major unsuccessful bills that were approved by the House but filibustered on the Senate floor after being reported out of committee.<sup>17</sup> To the best of my knowledge, these seven major bills (five enacted) were drafted without technical assistance from agency officials—and certainly without any such agency input across party lines.<sup>18</sup>

This hardly should be taken to suggest that committee staff draft statutory text in isolation. In addition to frequent meetings with and directives from my principal, Senator Metzenbaum, I interacted regularly with Senator Kennedy's Labor and Human Resources Committee staff and with Senate Legislative Counsel (the civil service attorneys assigned drafting responsibilities). At various times, I consulted about drafting questions and negotiated textual changes on behalf of my principals, with Republican staff from the subcommittee or the full committee; with staff from other Senators' offices; with my House committee counterparts from both parties; and with players outside Congress including lobbyists for labor organizations, civil rights groups, trade associations, individual companies, and local governments. But the absence of technical input from agency officials contrasts notably with Professor Walker's findings from agency officials who say they make technical drafting contributions on "nearly all of the bills that ultimately get enacted that directly affect their agency."<sup>19</sup>

Inter-branch dynamics in the legislative drafting process may have changed in the decades since the late 1980s and early 1990s. And labor and civil rights legislation, which is often divisive along party lines, may differ from other subject fields regarding input sought by congressional staff from the opposite party.<sup>20</sup> But an important factor in the dissonance between my

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N.Y. TIMES, July 12, 1988, at A24 (noting that Reagan had cited the same advance notice requirements as his main reason for vetoing an earlier foreign trade bill);

<sup>17</sup> See Workplace Fairness Act of 1992, *supra* note 15; High Risk Occupational Disease Notification and Prevention Act of 1987, *supra* note 15. I was the principal Senate committee staffer for drafting and negotiation on both of these bills.

<sup>18</sup> There may have been *substantive* assistance from agency officials to Republican committee staff on one or two of these bills. In the Senate, the Fair Labor Standards Amendments of 1985 were a joint effort by Senators Nickles and Metzenbaum. Although I do not recall any Labor Department drafting input for my Republican staff counterparts, it is possible that they were being advised by agency officials as they negotiated text with me and other Democratic staff. And at early legislative stages of the Older Workers Benefit Protection Act of 1990, the EEOC was involved through Senate Republican committee staff in certain substantive aspects of textual negotiations. For the five other bills (three enacted), the drafting took place in Senate and House Democratic committee staff offices, working with Legislative Counsel and interested outside groups, but not agency officials.

<sup>19</sup> Walker, *supra* note 1, at 1390.

<sup>20</sup> In addition, when I came to the Hill in 1985 I was a relatively experienced attorney following two years as a judicial law clerk and four years in private practice. Staff who do not have either law degrees or law-related experience may be more inclined to seek technical drafting assistance—from agencies and also from interest groups. That said, during my seven years of service in the Senate,

own experience and what agency officials reported to Professor Walker is likely to be that the congressional drafting process is complex, messy, and far from uniform.

In parliamentary systems, where the government controls the substance of proposed text and the lawmaking procedures, the executive branch can be virtually assured this text will be enacted as proposed.<sup>21</sup> By contrast, in our system Congress creates laws from the ground up. Bills are usually drafted by partisan committee staff or nonpartisan legislative counsel, modified by amendments offered in committee or on the floor, and reconciled into final shape through conferences between the two chambers.<sup>22</sup> As Abbe Gluck and Lisa Bressman have reported in depth, congressional drafters recognize and credit multiple factors in the drafting process.<sup>23</sup> Gluck and Bressman conclude there is “no mechanism for coordinating congressional drafting behavior” or classifying it in anything close to uniform terms.<sup>24</sup>

One example of non-uniformity is that Senate and House legislative counsel may play an important nonpartisan role in the drafting process, and agencies rarely if ever meet with personnel from these offices. There are also considerable variations in drafting approaches and dynamics between committees. For instance, the tax standing committees (guided by the Joint

most staff colleagues working with the labor and judiciary committees, on both sides of the aisle, had advanced degrees of some kind as well as practical experience in their fields.

21 See James J. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1, 44 (2007) (“Because the [British] government enjoys majority support in Parliament for its legislative program and traditionally imposes tight party discipline, there is rarely a need for it to negotiate or modify its original position.”); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 448 (1990) (“Parliamentary systems give the government control over the content of law, the leisure to get things right before introducing bills, and confidence that the proposed text will be enacted as is.”).

22 See Brudney, *supra* note 21, at 45 (“[D]ue to formal divisions in power between the executive and legislative branches, as well as relatively lax party discipline and various procedural obstacles within Congress, most major bills that become public laws undergo considerable change from introduction to final enactment.”); Easterbrook, *supra* note 21, at 448 (“Bills are drafted by junior staffs of legislators, abused by amendments from multiple and conflicting sources, and often hammered into shape at the very end of the session, with little time for review.”).

23 See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1015 (2013) (“Our respondents emphasized many other influences on the drafting process that legal doctrine does not take into account . . . including the central role of Legislative Counsel in drafting text, the division of Congress into committees, the type of statute and legislative process, and the personal and professional differences across drafters and agency personnel.”); see also Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 NYU L. REV. 575, 583-93 (2002) (describing the complexity and variability of approaches and mechanisms for legislative drafting).

24 Gluck & Bressman, *supra* note 23 at 1024; e.g., *id.* (“As we illustrate, not only the House and Senate Offices of Legislative Counsel but also many different committees each have different drafting practices—including different drafting manuals!”); Nourse & Schacter, *supra* note 23, at 583 (“Our responses indicate quite strongly that there is no uniform process of legislative drafting followed in all cases.”).

Committee on Taxation) have historically drafted on a bipartisan basis in close consultation with the Treasury Department, with the goal of securing unanimity prior to introduction.<sup>25</sup> By contrast, the labor standing committees often draft along partisan lines, with far greater likelihood of polarization and opposition in committee, followed by amendments on the floor.<sup>26</sup> Further, although committees are primarily responsible for crafting legislation under the traditional model, laws may emerge through unorthodox channels, especially in today's hyper-partisan and gridlocked environment. A notable example is omnibus bills written by the majority leader and various committee chairs, and bundled together just before floor consideration.<sup>27</sup> And there are separate drafting cultures in the House—where the party with a comfortable majority can often control the content of legislative language—and the Senate—where bill drafters understand they will generally need the assent of sixty members to do serious legislative business.

These divergent drafting models are layered onto the impact of divided government, an impact that resonated during my years of Senate committee service. Although divided government has been present far more often than not since 1980,<sup>28</sup> Professor Walker's survey respondents state that "the identity and politics of the congressional requester do not seem to matter too much" with regard to accepting the agency's technical feedback.<sup>29</sup> That conclusion conflicts with my observations described above, which date from a less toxically partisan period than has existed between the branches in recent times. Further, Gluck and Bressman report that seventy-six percent of congressional drafters indicated that divided government is relevant to whether drafters intend for the agency to have gap-filling authority.<sup>30</sup> In short, it stands to reason that Democratic committee staff, while drafting legislation, will not reach out as often, or on as weighty matters, in search of technical drafting assistance from agencies in a Republican executive branch,

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<sup>25</sup> See James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1246-47, 1280-83 (2009).

<sup>26</sup> See *id.* at 1262, 1282.

<sup>27</sup> See also Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1800 (2015) (noting that the omnibus appropriations process is now being used in ways other than its intended purpose). See generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (4th ed. 2012) (providing a broader account of existing legislative processes implemented in unconventional ways to pass legislation.)

<sup>28</sup> The Presidency and both Houses of Congress have been controlled by the same party for eight of the 36 years from 1981–2016: 1993–1994, 2003–2006, and 2009–2010. The Senate majority was filibuster-proof in only two of those eight years: 2009–10. Chris Canipe, *Presidency, House and Senate: What Happens When One Party Takes Control*, WALL ST. J. (Jan. 20, 2017) <http://www.wsj.com/graphics/congress-control/> [<https://perma.cc/C656-RG83>].

<sup>29</sup> Walker, *supra* note 1, at 1395.

<sup>30</sup> See Gluck & Bressman, *supra* note 23, at 1000 (reporting that forty percent indicated divided government was always or often relevant, and thirty-six percent that it was sometimes relevant).

and vice versa. Agency officials surveyed by Professor Walker report that they will respond as requested regardless of divided government. Still, it would be important to know not only how often agencies are asked for input in divided government circumstances, but also how often the agencies' input is actually accepted by congressional staff from the opposite party, as well as if the nature of the technical requests differs during periods of divided government.

Gluck and Bressman report, based on their survey of congressional drafters, that agencies "often . . . participate in drafting and can be very useful partners," although the authors also point out that drafters "sometimes avoided the agency, particularly when they were aware of a conflicting position."<sup>31</sup> My own anecdotal experience during seven years of divided government indicates that drafters do not usually request drafting assistance of a substantive or even technical nature from agency officials across party lines. From the congressional staff perspective it therefore remains at least questionable whether legislating in the shadows "heavily influence[s] the scope and character of [agencies'] legislative mandates,"<sup>32</sup> or in what ways agencies are "deeply involved in the legislative process from a technical assistance perspective for statutes that directly affect them."<sup>33</sup>

Stepping back, it seems plausible that players in each branch, immersed in their own contributory roles, may be inclined to oversell their respective control of or influence over the legislative drafting process. Yet it is the congressional players—vested with responsibility for initiating and consummating the legislative product—who have primary knowledge of what transpires as part of the drafting process. More information from the congressional perspective might help to modulate the potential for self-promoting responses from agency personnel. For instance, when Professor Walker refers to agency perceptions on factors that affect "whether the congressional requester accepted the agency's technical feedback on proposed legislation,"<sup>34</sup> one concession to modulation would recognize that "accepted" may be a woolly concept. If agency technical feedback addresses several points, both major and minor, what qualifies as acceptance? And would the congressional requester calibrate acceptance in roughly the same way as the agency provider? Walker is not insensitive to this problem: at one point, he acknowledges that it is virtually impossible for a court to ascertain which parts of the statute the agency drafted, or even agreed with.<sup>35</sup> Nonetheless, a proper assessment of the influence wielded through technical drafting assistance

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<sup>31</sup> *Id.* at 1000.

<sup>32</sup> Walker, *supra* note 1, at 1397.

<sup>33</sup> *Id.* at 1403.

<sup>34</sup> *Id.* at 1395.

<sup>35</sup> *See id.* at 1404-05 (explaining this difficulty in terms of the "shadow" nature of the drafting).

requires a deeper and more contextualized appreciation for how congressional staff receiving this feedback perceive its value and integrate its substance.<sup>36</sup>

## II. AGENCY MOTIVES FOR RESPONDING TO CONGRESSIONAL STAFF REQUESTS

Also relevant to the context of these technical drafting conversations is Professor Walker's identification of four distinct reasons—or justifications—that agency officials offered for responding to every congressional request. I found these four justifications to be quite persuasive as a group. It is worth noting how two of the reasons are essentially exogenous to refining or enhancing the merits of particular drafts while the other two more directly implicate the status of draft legislation.

Specifically, “maintain[ing] a healthy and productive working relationship with Congress,”<sup>37</sup> and helping to “educate the congressional staffers about the agency’s existing statutory and regulatory framework”<sup>38</sup> sound as process, rather than merits, type justifications. By furnishing professionally respectful responses and providing educational overviews, agency officials maintain and lubricate their relations with congressional staff unrelated to the merits or risks that inhere in particular draft bills.

Agencies have ongoing and often complicated relationships with the staff from congressional standing committees. Beyond legislative drafting, agency officials frequently interact with committee staff prior to and during confirmation hearings for high-ranking agency personnel, and also with respect to the committee’s oversight functions.<sup>39</sup> The agency players for these distinct functions (technical drafting, political nominations, substantive oversight) may well differ, but the same committee staff are likely to be responsible in all three areas.<sup>40</sup> It is therefore valuable, and at times even essential, that agency drafting experts respond positively to requests from

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<sup>36</sup> Walker’s empirical discussion includes a brief subsection titled “The Congressional Reply” (I.B.3) but this essentially provides inferences from agency personnel rather than perceptions from the congressional staff players. *Id.* at 1395-96

<sup>37</sup> *Id.* at 1391

<sup>38</sup> *Id.*

<sup>39</sup> See WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY, ELIZABETH GARRETT, JAMES J. BRUDNEY, *CASES AND MATERIALS ON LEGISLATION AND REGULATION* 996-1009, 1019-1023 (Fifth ed. 2014) (describing congressional monitoring of agencies through oversight hearings and investigations, and through the confirmation process).

<sup>40</sup> With respect to the Senate Labor Subcommittee during the 1980s and 1990s, our limited number of majority and minority staff handled all three of these areas. Based on my experience and perceptions, the same committee staff in labor, civil rights, education, and other substantive areas are responsible for working with usually-different groups of agency officials regarding drafting of text, preparing to question executive branch nominees, and carrying out many oversight activities.

committee personnel who can directly affect their agency colleagues' responsibilities in other aspects of the inter-branch dialogue.<sup>41</sup>

Agency officials offered two additional justifications for responding to every request; these relate more directly to the substance of draft legislation. When agencies "help[] ensure that the proposed legislation does not unnecessarily disrupt the existing statutory (and regulatory) scheme,"<sup>42</sup> their technical assistance targets the merits of the draft law under review.<sup>43</sup> And when technical drafting assistance serves as "a very good source of intelligence," that assistance enhances the agency's ability "to anticipate, monitor, and respond to potential [future drafts] that could affect the agency and its regulatory activities."<sup>44</sup> Here the agency is focused on possible risks flowing from subsequent draft proposals.

These merits-related justifications, especially avoiding unnecessary disruption of existing laws and regulations, suggest that agency officials may have strategic as well as relational motives when responding to congressional requests. It is hardly surprising that agency officials would act on the felt need to preserve from disruption their existing substantive powers and responsibilities even as they are asked only for *technical* input. One might also expect that such merits-related reasons figure more prominently for bills introduced and promoted by committee leaders, which have a reasonable likelihood of becoming laws, than for bills offered by backbenchers or minority members where there is far less chance of enactment (but the agency retains its desire to maintain healthy relations and also to educate members who may occupy positions of leadership in the future).

The distinctive nature of agency officials' motivations may be relevant when assessing whether to adjust the calculus for OMB clearance. As Professor Walker explains, an executive agency must go through an OMB coordination and preclearance process when it proposes to engage in legislative activity.<sup>45</sup> If the justification of avoiding unnecessary disruption of existing laws and regulations is playing an especially central role in technical drafting assistance where laws are later enacted, perhaps OMB should consider reviewing this type of assistance as substantive. In response, agency

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41 I assume for present purposes that agencies communicate reasonably efficiently on an internal basis regarding their distinct functions. Professor Walker contends, based on his own findings and those of other scholars, that this is the case regarding communications among agency officials who are legislative lawyers, regulatory lawyers, and policy experts. *See supra* note 1, at 1402-03.

42 *Id.* at 1391.

43 This merits-related advising arguably implicates a substantive interpretive role described by one legal scholar as "discern[ing] and apply[ing] the background principles of the field of law involved." Jonathan R. Siegel, *Guardians of the Background Principles*, 2009 MICH. ST. L. REV. 123, 130 (2009).

44 Walker, *supra* note 1, at 1391.

45 *See id.* at 1385 (noting that legislative activity "involves the agency expressing a policy or substantive view on legislation.").

officials—or Professor Walker—may wish to explain how such merits-related technical drafting assistance differs from what is described as substantive legislative activity, apart from the fact that Congress is the initiating requester in the technical assistance setting.

To be clear, I do not support an expanded role for OMB preclearance. Professor Walker considers arguments in favor of greater transparency in the shadow lawmaking context, including requiring OMB preclearance. However, he is against extending such presidential review over technical drafting assistance for reasons he explains in persuasive terms.<sup>46</sup> I agree that enforced exposure to White House bureaucratic review might well chill congressional staff from consulting with agency drafting experts. The chilling effect seems especially likely in today's polarized partisan environment, intensified by constant political media exposure flowing from the 24-hour cable news cycle. Democratic committee staff will be wary of reactions from their base for consulting with Republican agency officials, and Republican executive agency drafting experts may fear being hammered by Republican members of Congress if they are known to be interacting with Democratic committee staff on possible draft legislation.<sup>47</sup> At the same time, part of what justifies Walker's argument against extending preclearance review is the premise that this technical assistance is purely technical. Insofar as one important reason for responding to congressional staff requests strikes a more strategic and substantive chord, further justification may be needed.

### III. TECHNICAL DRAFTING ASSISTANCE AND THE CREATION OF AMBIGUOUS TEXT

An important additional question addressed by Professor Walker is whether agencies' shadow role in the drafting process should have implications for their position as interpreters of the statutory product to which they contribute. In order to answer this question, one must first consider agencies' special interpretive position in the legislative process.

It is well understood that at a substantive level, agencies occupy a privileged place in the lawmaking enterprise. Executive branch agencies regularly interact with congressional staff at multiple stages under *authorized* (OMB-approved) circumstances: they work with staff to draft initial statutory language (as in the tax committee circumstances described above);<sup>48</sup>

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<sup>46</sup> See *id.* at 1429-30 (noting the problems with OMB review, including "the lack of transparency in the OMB review process and the lack of accountability for OMB decisionmaking" as well as the chilling effect on congressional requests that I discuss in text).

<sup>47</sup> See generally *id.* at 1427-28.

<sup>48</sup> See *supra* text accompanying note 25.

present their own draft bills for introduction by committee staff; testify on proposed legislation at committee hearings; provide official views as part of committee markups; send letters to committee chairs or congressional leaders indicating changes the President would like to see made as bills approach a floor vote; and advise the President about signing or vetoing approved bills.<sup>49</sup> Because of this insider status, legal scholars have long recognized that agencies have a comparative institutional advantage (over judges and outside interest groups) in discerning the meaning of ambiguous or inconclusive text, based on their understanding of the specific legislative intent or general legislative purpose underlying such text.<sup>50</sup> Professor Walker's earlier empirical work,<sup>51</sup> as well as the contributions from other legal scholars,<sup>52</sup> support the conclusion that agencies are especially well situated to engage in purposivist analyses of statutory texts that identify their powers, responsibilities, and limitations.

At the same time, scholars have recognized that agencies' privileged access to the lawmaking process may justify a degree of caution when considering how those same agencies construe and apply the text they had a hand in helping create. As Walker notes, an agency may invoke its insider understanding of congressional purpose to steer imprecise or ambiguous

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<sup>49</sup> See Walker, *supra* note 1, at 1378 (discussing agencies presenting their own draft bills); *see also* Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 337 (2013) (discussing agencies testifying on proposed legislation); Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 494 (2017) (discussing agencies public and informal ways of expressing opposition to pending legislation); Christopher J. Walker, *Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting*, ADMIN. CONF. U.S. 8 (2015) <https://ssrn.com/abstract=2826146> [<https://perma.cc/V3B6-88J4>] (discussing agencies advising President about signing or vetoing approved bills as well as agencies providing official views as part of committee markup).

<sup>50</sup> *See, e.g.* Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 97–98; Siegel, *supra* note 43, at 130; Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 884 (2015); Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 329, 347 (1990). For a succinct explanation of the difference between intent (the specific understanding the legislature had in mind during the enactment process) and purpose (what the legislature ultimately sought to accomplish following enactment), *see* Herz, *supra*, at 93. Like Professor Walker, I assume in this context that legislative history may in suitable circumstances provide reliable evidence of legislative intent, and that legislative purpose is a coherent and meaningful concept, thereby avoiding debates with ardent textualists like Justice Scalia and dedicated public choice advocates like Judge Easterbrook.

<sup>51</sup> *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1036–47 (2015) (discussing agency roles in legislating; the purpose and reliability of legislative intent; the reliability of legislative history; and the factors affecting this reliability).

<sup>52</sup> *See supra* note 50; Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 511 (2005) (“[Agencies] might, as a prudential matter, have a better chance of understanding the real political context, which is only partially revealed by legislative history as argued to courts in litigation.”).

statutory text in a direction that enlarges the agency's own power, or that invites the exercise of its policymaking discretion.<sup>53</sup> An agency may act on a faithful but myopic commitment to its own specialized mission, a commitment that tends to discount, if not obscure, the legislative compromises, tradeoffs, and rejected alternatives that would leave the agency without the relevant policymaking discretion.<sup>54</sup>

Alternatively, an agency may use purposive interpretation to expand its implementation powers through use of a strategically self-aggrandizing "interpretive creep" that extends agency authority beyond what the enacting legislature could possibly have meant.<sup>55</sup> In either instance, it may be useful to distinguish between a range of ethically defensible reasonable interpretations and what the agency views as the optimal interpretive approach.<sup>56</sup> Still, whether through myopia or strategy, an agency profiting from its privileged access may expand its policymaking discretion in ways deserving of judicial pushback. And as Walker also recognizes, part of that pushback may well be an argument to narrow the scope of *Chevron* deference.<sup>57</sup>

This debate about the benefits and risks associated with agencies' use of purposive interpretation largely derives from agencies' role as participants in the *substantive* lawmaking process, acting with OMB's knowledge and acquiescence (if not always its full blessing). What do Walker's new findings about *technical* drafting assistance add to this ongoing debate among administrative law scholars and judges? Professor Walker, in effect, assumes the agency officials' responses demonstrate that the risks of agency manipulation are exacerbated, inasmuch as the agency is likely using technical drafting assistance to create ambiguities that will subsequently expand its power. Yet it may be equally plausible to view the technical drafting exchanges as providing a purchase from which the agency can continue to understand the congressional drafters' purpose and intent, even as the exchanges exert virtually no influence over the substance of the legislative product.

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<sup>53</sup> See Walker, *supra* note 1, at 1411-12.

<sup>54</sup> See Herz, *supra* note 50, at 104-05 ("The EPA may focus on Congress's desire to achieve clean air in the Clean Air Act and do anything to get there, or the EEOC overemphasize equality concerns and downplay employers' interests.").

<sup>55</sup> See Damion M. Schiff, *Purposivism and the "Reasonable Legislator": A Review Essay of Justice Stephen Breyer's Active Liberty*, 33 WM. MITCHELL L. REV. 1981, 1091-92 (2007) (defining interpretive creep as the movement of statutory interpretation toward a policy that was beyond what was possible given the legislative makeup at the time of passage); Herz, *supra* note 50, at 105-06 (questioning if agencies are more prone to interpretive creep than judges).

<sup>56</sup> See Aaron Saiger, *Agencies' Obligation to Interpret the Statute*, 69 VAND. L. REV. 1231, 1239-42 (2016) (exploring the difference between "ethics" and "internal normative direction" as applied to agency statutory interpretation).

<sup>57</sup> See Walker, *supra* note 1, at 1421-25.

This latter perspective is especially relevant to the two types of process-related motivations Walker identified: fostering a productive working relationship and educating congressional staff. Insofar as technical drafting assistance is offered for such non-merits reasons, it seems unlikely to affect the meaning or implications of text. Rather, Walker's suggestions for narrowing the reach of *Chevron* deference, or requiring that Congress be more precise about authorizing such deference,<sup>58</sup> may depend on the assumption that an agency has helped shape the ambiguities of particular texts through technical drafting assistance with the primary purpose of avoiding disruption of the existing statutory or regulatory scheme. But assuming, *arguendo*, that this motive for furnishing technical drafting assistance is present at least some of the time, it remains to be established that agencies in such settings are more than simply privileged but peripherally involved observers in the development of those texts.

Walker argues cogently for his proposal that *Chevron* deference should be more limited going forward—based on examining “whether the collective Congress reasonably intended to delegate by ambiguity [a] particular issue to the agency.”<sup>59</sup> In empirical terms, that argument should be evaluated primarily by reviewing instances where agencies are acting with authorized *substantive* input into the drafting process, as occurred in *King v. Burwell*.<sup>60</sup> And there are several reasons to doubt whether the provision of technical drafting assistance is likely to alter the calculus on this question.

First, Congress pursues multiple drafting channels as explained above, and many do not implicate technical drafting assistance at all. In addition, it seems intuitive to assume that when congressional staff request technical drafting assistance, as opposed to asking for or receiving substantive assistance, they are paying close attention to its being truly technical. This is especially likely to be true if technical assistance is requested across the partisan aisle. Even for same-party settings, members of Congress have paid increasing institutional attention to the prospect of undue agency influence

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<sup>58</sup> See *id.* at 1421-22 (“[T]he *Chevron* Step Zero inquiry would focus not just on the formality of the agency procedure creating the interpretation but also on whether the collective Congress intended to delegate that particular substantive question to the agency.”).

<sup>59</sup> *Id.* at 1421.

<sup>60</sup> In *King v. Burwell*, Chief Justice Roberts for the Court recognized that “a statute’s ambiguity constitutes an implicit delegation from Congress to the agency [in this instance the IRS] to fill in the statutory gaps,” but declined to conclude that Congress intended such a delegation regarding interpretation of the tax credit provisions of the Affordable Care Act—both because the provisions were so centrally important to the statutory scheme and because the IRS lacked expertise on health insurance policy matters. 135 S. Ct. 2480, 2488-89 (2015). Walker analogizes his case-by-case approach for assessing delegation-by-ambiguity to the position taken by Chief Justice Roberts in *King v. Burwell*. See Walker, *supra* note 1, at 1423-25.

over the interpretation of the legislative work product.<sup>61</sup> Further, Walker's current findings do not appear to disclose how often technical drafting assistance is generated for bills that pass, or how often within that subset the motivation of agency officials was to avoid disruption of their existing statutory scheme. At the very least, more precise information is required given that the problem of injecting ambiguity should arise only if the agency is actually a shaping player through its technical drafting assistance.

Finally, the possibility that this technical assistance creates meaningful pressures to draft in broad, vague, or ambiguity-creating ways minimizes once again the primary role of congressional staff. Committee staff may resist such pressures, assuming *technical* drafting assistance produces them. Perhaps more relevant, staff may favor textual ambiguity during the drafting process primarily for legal process-type reasons<sup>62</sup> that do not advance the risk of collusion with agencies as suggested by Walker.<sup>63</sup> Such reasons include avoiding excessively precise language in recognition that the law must cover unforeseen circumstances of fact or social policy; maintaining a flexible scheme under which regulated entities can survive or flourish even as they are channeled in their service to public-seeking goals; enabling legislative coalitions to form on the floor or in committee; and even failing to consider the issue at all, given that legislative drafting and enactment may at times take place in a "harried and hurried atmosphere."<sup>64</sup> It is worth emphasizing that these reasons are essentially unrelated to any agency drafting role, be it substantive or technical.

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<sup>61</sup> See, e.g., Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. §202 (2017) (requiring courts to engage in de novo review of agency interpretations of statutes or regulations, thereby overriding *Chevron* rule of deference, and passed by Republican controlled House on January 11, 2017); Separation of Powers Restoration Act of 2017, H.R. 76, 115th Cong. §2 (2017) (similarly aimed legislation to modify the scope of judicial review, introduced by fifty-two Republican House members); A bill to amend Section 706 to Title 5, United States Code, S.1766, 98th Cong. (1983) (seeking the same result with a bipartisan group of seven Senators); Judicial Review Improvement Act of 1985, S.1256, 99th Cong. (1985) (seeking the same result and introduced by a bipartisan group of five Senators); cf. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) (criticizing *Chevron* for having "added prodigious new powers to an already titanic administrative state").

<sup>62</sup> A corollary to the Hart & Sacks description of law as a purposive activity is that legislatures, as legal institutions, act pursuant to a distinct set of processes and procedures—and that the legislative process, which includes its own set of rules and standards, is informed, deliberative, efficient, and public-seeking. See HART & SACKS, *supra* note 2, at 695.

<sup>63</sup> See Walker, *supra* note 1, at 1414-16 (explaining how the mutually helpful relationship between agencies and Congress can lead to a structure where Congress as a body is no longer the principal in the relationship).

<sup>64</sup> *Shine v. Shine*, 802 F. 2d 583, 587 (1st Cir. 1986).

## CONCLUSION

Professor Walker has contributed intriguing findings to the conversation regarding agency officials' involvement in the legislative drafting process. Still, the inter-branch aspects of this process warrant further examination and analysis in a larger, more diverse context. An important threshold question is whether congressional staff regard the technical assistance they have requested and received in the same consequential terms as the agency officials who provide it. I have tried to explain why that may not be the case—given the absence of any uniform or coordinated approach to congressional drafting; the important influence of divided government on drafting dynamics; and the understandable inclination of legislative outsiders to exaggerate the weight of their contributions to the drafting process.

Accepting, however, that technical drafting assistance plays some role in the lawmaking enterprise, there remains the question whether the agency's added technical purchase alters the pre-existing calculus regarding respect for agency purposive interpretation. I am not sure why it should, unless one concludes that this technical assistance is being successfully offered for strategic or self-promoting reasons with non-trivial frequency, as Walker's interviewees seem to suggest. If that is the case, then perhaps the current distinction should be framed not as technical versus substantive drafting assistance but rather as agency-controlled versus Congress-controlled drafting participation. Under this framing, Walker's persuasive arguments against requiring presidential preclearance for technical drafting assistance might also have implications for debates involving substantive agency assistance in the drafting process.<sup>65</sup>

Finally, insofar as technical drafting assistance is delivered during periods when ambiguities arise, or are allowed to remain, in the drafted text, I have suggested that Congress has its own reasons for creating or preferring a certain amount of ambiguity. Under such circumstances, technical drafting assistance may well make no causal contribution. Accordingly, there would be no justification for altering the deference regime in response to the agency's role.

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<sup>65</sup> See Walker, *supra* note 1, at 1429-30 (contending that presidential review could (a) chill dialogue between staffs and agency officials, (b) delay the quick turnaround time staff expect when seeking such assistance, and (c) impose an unnecessary obstacle given that the agency's legislative staff already serve as gatekeepers and liaisons with Congress).